

LINKAGES

*By David W. Leebron**

Trade and the environment. Trade and workers' rights. Trade and competition policy. Trade and eighteen million tiny feet.¹ It begins to resemble a question from an IQ test: which of the preceding pairs of issues does not fit? Increasingly, it seems there is no pairing with trade for which some argument cannot be made. The "trade and . . ." industry is booming.

The growth of the "trade and . . ." business derives from two converging forces. First, more issues are now regarded as trade related in the narrow sense that the norms governing those issues affect trade, or conversely, that changes in trade flows affect the realization of those norms. Second, an increasing number of substantive areas are the subject of international coordinated action or multilateral agreements. Even if conduct in such areas does not directly affect trade flows, the creation of formalized regimes governing them raises the question how such regimes should be related to the trade regime and whether, for example, trade sanctions should be employed to enforce nontrade policies and agreements. In three important areas—human rights, workers' rights, and environmental protection—claims are based in part on concerns for the welfare of those in other nations. Domestic measures alone cannot address such concerns, and means (short of war) are therefore sought to influence governments abroad.

These issues came to the fore in both official negotiations and street protests at the Third Ministerial Conference of the World Trade Organization held in Seattle in 1999. Many developed nations sought to link issues of environmental protection and labor standards to the trade negotiations, an effort that most developing nations vehemently opposed.

In this essay, I explore two fundamental questions. First, what is the nature of the claim, and the justification for it, that some issue or regime should be linked to trade policy? Second, assuming some linkage is called for, by what modalities can or should a "nontrade" issue be linked to the trade regime? The goal of this paper is to identify the different kinds of arguments made for linkage, the various means of achieving such linkage, and its costs as well as benefits. In short, I develop an analytical framework rather than an evaluation of specific claims and in so doing focus on the "and" in the "trade and . . ." problem.

This paper consists of four parts. Part I analyzes the conceptual notion of linkage, and in particular the concept of an "issue area." Part II sets forth the various arguments underlying claims for the linkage of issues, issue areas, and regimes. Part III then examines the different ways one regime or issue area might be linked to another regime or issue area. Finally, part IV offers some preliminary thoughts on trade linkage claims. In particular, I suggest that while the claims for linkage ought to be given significant weight, more creative (and looser) modalities for linkage should be sought so that the conflicting concerns can be better accommodated.

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¹ Margaret Studer, *Two Nations Struggle over a Prize with Eighteen Million Tiny Legs*, WALL ST. J., Aug. 17, 1995, at B1 (reporting German government's interference with export of beetle collection).

I. THE CONCEPT OF LINKAGE

A claim that issues should be linked ultimately rests on the view that the resolution of one issue or group of related issues will or should affect, or be affected by, the resolution of the other issues or group of issues. Such interdependence might result solely from the actions of the claimant, meaning that the claimant's position on the resolution of one of the issues will potentially be affected by how the other issue is resolved. Alternatively, the claimant might not assert that its position on one issue is dependent on the other, but only suggest that for exogenous reasons the two issues ought to be resolved together. As I will explain in greater detail below, the linkage claim might in this sense be strategic or substantive or both. Before considering justification, however, we need to understand more clearly just what it is that might be linked.

Issues² can be linked at different levels of aggregation. One might seek to link specific issues, two or more groups of related issues, or two regimes established for the governance of distinct substantive areas. Specific issue linkage is the simplest form of linkage, referring to a linking (in any of the senses discussed in part III) between relatively narrow questions on which well-defined resolutions can be reached. For example, the United States might assert in the course of a trade negotiation that its agreement to a particular provision in one agreement (e.g., the time period for the abolition of quantitative restrictions on textiles) is conditioned on a particular concession by another negotiating party under a different agreement (e.g., the time period for phasing patent protection for pharmaceuticals). The linking of diffuse sets of issues presents more difficult problems. In some instances, the issue areas to be linked are governed by discrete agreements and institutions, which we will call regimes.³ That prompts the further question whether, and by what means, those regimes should be linked to one another.

Issue Areas

Issue area or cluster linkage posits some connection between a group of issues in one area of regulatory activity and a group of issues in a different area. A claim that the trade regime should be linked to environmental protection or to workers' rights suggests that the broad cluster of issues in trade should be linked to the similarly broad set of issues in one of these other areas. This suggestion is quite different from, for example, the comparatively modest and narrow claim that subsidies for environmental purposes must be dealt with in an agreement on subsidies in international trade, or that the trade regime ought to allow a country to prohibit the import of products made by prison labor. Arguably, the satisfactory resolution of the trade aspects of these issues requires reference to norms and values outside the trade regime, but so do many issues accepted as within the compass of the trade regime. Values of health and morality, for example, are recognized as the basis for legitimate exceptions to GATT obligations.⁴

Connecting one group of issues to another requires elaboration of the concept of "issue area." This term was adopted by international political theorists as an alternative to using

² I use "issue" here more in the regulatory sense of a question that must be addressed than in the somewhat more limited sense adopted by many political scientists of a question in dispute.

³ For example, the linkage between trade and monetary relations is accomplished primarily through various relationships between the WTO and the International Monetary Fund (IMF). For further elaboration of the notion of "regime," see p. 10 *infra*.

⁴ Article XX(a) of the General Agreement on Tariffs and Trade (GATT) contains a general exception for measures "necessary to protect public morals," and Article XX(b) contains an exception for measures "necessary to protect human, animal or plant life or health." General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194. The current version of the GATT is in Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Apr. 15, 1994, in *WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 3 (1999) [hereinafter *THE LEGAL TEXTS*], reprinted in 33 ILM 1154 (1994).

countries as the basic unit of analysis in identifying the determinants of international political behavior. Focusing on a group of substantively related issues was a way to limit analysis of complex phenomena, and also more accurately reflected the bureaucratic structure of most governments. As in domestic politics, different groups might influence foreign policy in different substantive areas. Empirical studies should therefore not focus on the determinants of “foreign policy” generally, but on how policies were arrived at in particular subject matter areas. This approach resulted in the separation of policy areas from one another, but allowed the relationship between domestic and foreign policy to be more fully considered.⁵ “Issue area” was thus part of the conceptual arsenal of those who attacked the dichotomy between national and international.⁶ It operated at an intermediate level of generality, where empirical analysis could be meaningfully structured and theories could provide useful, albeit limited, predictions.

An issue area can be as narrow as the international shipment of hazardous substances or as broad as protection of the environment. The chief characteristic of such areas is the substantive relationship of the issues encompassed within them. As originally set forth in the context of international political theory, the boundaries of an issue area were “delineated . . . by the distinctiveness of the values and the behavior they encompass.”⁷ Although writers acknowledged the indefiniteness of issue areas, it was not an obstacle to studying international policy in particular substantive contexts. The problem of defining the scope of specified substantive areas of international regulation takes on more importance when states enter into formal agreements and establish international institutions to govern those areas. In that case, the definition of a particular issue area becomes a legal question, as the participants seek to define the scope of activity properly governed by such an agreement or institution. Delineating the proper scope of a specific international legal regime is subject to substantial dispute, negotiation, and evolution. The interaction of political, bureaucratic, and legal processes can often result in arbitrary demarcations of the competence or scope of an international regime.

The issue area of trade, for example, has evolved from the comparatively narrow conception of trade in goods (primarily limited to the issues of border treatment and discrimination) to a much broader regime encompassing services, intellectual property, and many aspects of domestic regulation. Indeed, the roughly four years spent negotiating the agenda for the Uruguay Round of Multilateral Trade Negotiations were largely devoted to deciding which subjects were fairly encompassed within the rubric of trade.⁸ One could characterize

⁵ See generally James N. Rosenau, *Pre-Theories and Theories of Foreign Policy*, in *APPROACHES TO COMPARATIVE AND INTERNATIONAL POLITICS* 27 (R. Barry Farrell ed., 1966). Rosenau “was the first of several foreign policy theorists to suggest the need for an issue area typology in order to better understand the external behavior of states.” William C. Potter, *Issue Area and Foreign Policy Analysis*, 34 *INT’L ORG.* 405, 407 (1980). Rosenau was applying a concept developed by Robert Dahl and Theodore Lowi in the context of domestic political analysis. See ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); Theodore Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 *WORLD POL.* 677 (1964).

Rosenau, of course, realized that issue areas, like countries, were subject to external influences. He acknowledged the arguments regarding the changing boundaries of issue areas:

And why should the boundaries of issue-areas be so vulnerable? Because bargaining among issue-areas is a major characteristic of geographic and other types of horizontal systems. Indeed, the stability of such systems is considered to be crucially dependent on their ability to resolve conflicts in one area by compromising in other areas.

Rosenau, *supra*, at 78. While acknowledging that “[t]here can hardly be any dissent from much of this reasoning,” Rosenau thought that the analytic power of the concept outweighed these difficulties, and that in any event other boundary assumptions used in international political analysis were at least as “penetrated.” *Id.*

⁶ Rosenau, *supra* note 5, at 56. Despite its central position in public policy analysis, the concept of “issue area” has received comparatively little attention. Potter, *supra* note 5.

⁷ Rosenau, *supra* note 5, at 81.

⁸ In the end, both intellectual property and services were included on the negotiating agenda, but intellectual property was formally limited to “trade-related aspects” and services were put on the agenda of a formally separate negotiating group.

the negotiations over that agenda in two different ways. On the one hand, they dealt with the proper definition and scope of "trade negotiations." On the other hand, at least some of the parties regarded some of the agenda items as concerning linkage. These are somewhat different claims.

The question of linking issue areas arguably assumes a relationship between the issues to be linked that differs from the relationship between issues within an issue area; in other words, arguments about the scope of an issue area differ from arguments about linking issue areas. Thus, we need to distinguish two different kinds of claims. One is that some substantive area under negotiation includes a discussion and resolution of issue x , and the other is that issue x (or issue area X) should be linked to the negotiations on that substantive area. The former claim concerns the proper scope of an issue area for regulatory purposes, that is, what should be included within a particular regulatory regime for the purpose of achieving the optimal policy framework.

This question is analogous in this sense to the problem of optimal policy areas in the geographic sense. The geographic optimal policy area represents an attempt to determine the best geographic scope (e.g., local municipality, province, country, or world) for policy in a particular subject matter area (e.g., monetary policy). Once we determine that a given way of dividing geographical space is not optimal for all policy purposes, and designate some policies to be carried out at one level (e.g., national) and others at another (e.g., international), we necessarily face the critical problem of defining the scope of those areas. Trade has presented many such problems. For example, the safety of products is regulated for the most part at the national level. International trade is regulated under the auspices of a multilateral organization. The question, then, is to what extent the issue area of trade should encompass product regulation.

In the international context, the substantive scope of an issue area remains a problem even when both related areas are assigned to the international level, i.e., to multilateral agreements or institutions. This is also a potential problem for national governments, as issue areas must be defined and allocated among bureaucratic structures. But in the domestic context, there is virtually always some coordinating mechanism and superior authority (such as the chief executive) to coordinate both the allocation of tasks and the substantive resolution of issues. To this extent, all issues are potentially linked in political units where a governmental organ (such as a national parliament or chief executive) enjoys plenary authority. Although various international organizations have mechanisms for cooperating with each other, these relationships are generally neither hierarchical nor comprehensive. As a result, questions of issue area scope (or regime competence) are more salient.

The scope of an issue area can be regarded as both a normative and a descriptive question. Descriptively, it is simply a matter of observing what state practice is. Do trade agreements, for example, normally address questions of product regulation? From a normative point of view, the problem is to determine the best intersection between the optimal substantive policy area and the optimal geographic policy area. We might think that commercial policy, broadly speaking, would ideally encompass trade policy, competition policy, and product regulation, and that in the absence of international considerations regulation of these areas would be conducted by a single bureaucratic entity at the national level. However, in the context of a diverse, multinational world, we might also conclude that trade policy should be governed by an international regime, but that competition policy and product regulation should not. In such a case tension would be generated between the optimal substantive policy area and the optimal geographic policy area. We must either regulate some areas at the nonoptimal level (national or international) or separate some regulatory areas from others, which, apart from these concerns about "vertical" competence, would together form the optimal regulatory area.

States will often disagree about the optimal scope of issue areas on both counts (descriptive and normative). Furthermore, other political and strategic considerations will come into play, such as how interest groups within states perceive the effect on them of giving competence over certain issues to an international authority. Concerns about national sovereignty will tend toward restricting the competence of international regimes, hence limiting the legal definition of the issue areas over which those regimes exercise authority.

In sum, issue areas are determined not only by agreement but also by the normative relationship of the issues to each other. From the practical perspective of international negotiations, issue areas are best defined by both the normative and the descriptive aspects. Issue areas are thus areas of regulation or negotiation that are substantively very closely related in the sense that they ought to be dealt with in a single regulatory context *and* are in fact widely seen as requiring such bundling because of this substantive relationship. These relationships can be expected to change over time and, as suggested above, the delimitation of an issue area will not necessarily be the same for national and international purposes. This approach endows the issue area concept with more normative content than in the political science literature,⁹ but the definition remains descriptive insofar as it takes into account international consensus that a given issue is encompassed within a substantive area of regulation or negotiation.¹⁰ To a significant degree, that consensus derives from agreement about normative propositions that the issues ought not to be regulated or negotiated in separate contexts.

What, then, is the relationship between the scope of an issue area, and the linkage of issues to that area? The statement that two issues are, or should be, linked, generally at least implies that the connection between them is not so close that they must be dealt with in exactly the same way or in the same context. Once we seize upon the notion of linkage, we thus often exclude a more intimate relationship between the subjects. We conceive of some issues not merely as linked to trade, but as intrinsically part of the subject of trade. For example, we normally would not merely say that quantitative restrictions are linked to tariff concessions; rather, both must be addressed in any set of meaningful trade negotiations. They are inseparable.¹¹ Indeed, in this sense, the GATT originated in a context that abjured linkage, albeit on a temporary basis. As an interim agreement that was eventually to be incorporated into the umbrella International Trade Organization, the GATT was to include only issues necessary to tariff negotiations and bindings. Thus, most of the linked or related issues addressed by the ITO Charter, such as commodity agreements, competition policy, and aspects of economic development and investment, were omitted from the GATT.¹²

A claim under the definition put forth above that two issues or issue areas must be considered together without any claim that they are substantively related is clearly a linkage and not a scope claim. But even if the claim is that the two areas are substantively related, it will be a linkage claim, and not a scope claim, if there is no consensus either that the issues are very closely related or that they ought to be dealt with in a single context.

Linkage and scope of issue areas are interdependent concepts. As a practical matter, the scope of an issue area depends not only on the relationship between particular issues, but on how as a descriptive matter the issue area is defined. If an issue area is narrowly defined,

⁹ Cf. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 65 (2d ed. 1989) (stressing that definition of issue, hence issue area, is subjective).

¹⁰ See *id.* at 65 ("When the governments active on a set of issues see them as closely interdependent, and deal with them collectively, we call that set of issues an issue area.")

¹¹ In at least some conceptions of "issue areas," the issues within such an area are necessarily linked to each other. As Robert Keohane put it, "Decisions made on one issue must affect others in the issue-area, either through functional links or through regular patterns of bargaining." ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER* 58 (1989). In other words, issues within an issue area must be linked through substance or negotiations.

¹² For the definitive history, see JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

then even issues seen as closely related will be regarded as involving linkage. If an international agreement deals with transport of hazardous substances, the export of such substances would be regarded by many as outside the scope of the negotiation. On the other hand, if the topic is hazardous substances, or even more broadly international protection of the environment, then both transport and export of hazardous substances would be perceived as falling within the issue area. In short, before any claim of linkage arises, at least in the sense used here, we can expect disagreement about the proper scope of the issue area under negotiation. Whenever a party fails to prevail on an argument about the scope of an issue area, an argument (or negotiating position) insisting on linkage is probably available. I explore those claims in part II. It bears noting here, however, that the line between linkage and scope is unclear, and as claims of linkage to an issue area are increasingly recognized through certain means, such issues might eventually come to be regarded as being included within the scope of that issue area.

Regimes

Regimes and issue areas are similarly slippery concepts. Although the definition of an issue area will be affected by existing legal and institutional relationships, the concept itself does not depend on such formal arrangements. One leading definition of regime for purposes of international analysis is that set forth by Stephen Krasner: "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."¹³ The relationship of the regime concept to both international institutions and law (including most importantly multilateral agreements) has always been nebulous. The regime concept, as applied by international political scientists, is very closely associated with the issue area concept. Ernst Haas, for example, defined regimes as norms, rules, and procedures agreed to in order to regulate an issue area.¹⁴ Under this conception, it is unclear whether linking issue areas can be distinguished from linking regimes. International political and economic behavior is coordinated and organized through a variety of formal and informal mechanisms at every political level. The trade regime, for example, consists in this sense not only of the WTO and bilateral and regional agreements and institutions, but also of informal consultative mechanisms and expectations of behavior that occur on a plurilateral or bilateral basis.

This paper focuses primarily on the possibilities and difficulties of issue linkage in the context of formalized multilateral regimes. But evaluating the possible options and hence consequences of issue linkage makes it essential to consider less formal mechanisms as well. Even in the context of multilateral regimes, linkage may still be sought on a bilateral or plurilateral basis. Some multilateral regimes, such as the GATT, potentially limit the ability of one country to demand linkage in its relations with another country, and hence also limit the availability of less formal linkages between issue areas.

My purpose in adopting the regime concept here is to explore a potential for linkage beyond that presented by issues and issue areas, and for this reason I eschew the broader approach to regimes adopted in the political science literature. As used here, then, a regime refers to the international institutions and formal agreements (treaties) that govern an issue area. In this sense, of course, there are issue areas without regimes. Regime linkage may not differ significantly from issue area linkage with regard to the substantive claim that issues should be linked, but it poses different institutional questions.

¹³ Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983). For a brief review of regime definitions, see *id.* at 2-3.

¹⁴ Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 *WORLD POL.* 357, 358 (1980); see also Krasner, *supra* note 13, at 7 ("In a world of sovereign states the basic function of regimes is to coordinate state behavior to achieve desired outcomes in particular issue-areas.").

Indeed, it is the formalization of international, particularly multilateral, relations that lends such prominence to the question of linkage. In the context of informal bilateral relations, all international issues are to some extent subject to discussion, and thus can be informally linked at least as a matter of negotiating position. However, once international regimes are established to govern specific areas, linkage necessarily also becomes a formal institutional issue.¹⁵

Perhaps in part because the study, and indeed often the definition, of international regimes is limited to issue areas, little attention has been paid to the interactions between regimes and how they might be linked to one another. As issue areas often serve as little more than an empirical device, one response to linkage claims is simply to change the scope of the issue area.¹⁶ This approach, however, tends to obscure both the distinct aspects of the regimes governing the constituent issue areas and any rules or practices specifically applying to the problem of linkage.¹⁷ Following the analysis of scope and linkage above, the determination that linkage between substantive regimes is necessary or desirable does not mean that the optimal scope of the regime includes both policy areas. Still, as a practical matter, placing substantive areas in different regimes will generally make linking them more difficult and more controversial.¹⁸

II. A TAXONOMY OF LINKAGE CLAIMS

At the outset, we can distinguish two nonexclusive types of linkage claims. The first type proposes that an issue should be linked to trade because, in some sense, it is substantively related to trade. As I argue below, this type of linkage is based either on some relationship between the norms of the two regimes, or on the consequences of the norms of one regime for the goals of the other. I shall call this substantive linkage.¹⁹ It constitutes, in effect, a weaker normative claim than a scope claim, but a normative claim nonetheless. The second type of linkage is not necessarily based on any connection between the norms but, rather, on negotiation strategies and outcomes. I shall refer to this type of linkage as strategic linkage.

Substantive Linkage

What are the relationships between the norms of different regimes that might justify linking issues governed by those regimes? We can broadly distinguish between two types of substantive linkage claims: coherence based and consequentialist. The first emerges from the relationship of the substantive norms involved. A coherence claim can be based either on the congruence of the norms governing the linked issues, or on the conflict between them. If the norms are congruent, and ought to remain so, there is an argument for linking them together for purposes of both negotiation and subsequent governance to assure their continued coherence. On the other hand, if the norms governing two regimes are in conflict, and

¹⁵ This aspect of regimes also explains why membership issues become so important. The United States for years opposed China's entry into the GATT and then the WTO in part because it would prevent the United States from linking other issues, such as human rights and Taiwan, to trade relations with China.

¹⁶ Cf. VINOD K. AGGARWAL, *LIBERAL PROTECTIONISM: THE INTERNATIONAL POLITICS OF ORGANIZED TEXTILE TRADE* 27 (1985) (discussing the "nesting" of regimes).

¹⁷ Conversely, "The existence of interissue linkages limits the explanatory power of issue structure models. . . . No issue-specific explanation of events can be completely satisfactory in a world of multiple issues linked in a variety of ways." KEOHANE, *supra* note 11, at 95.

¹⁸ Cf. *id.* at 113 ("Insofar as the dividing lines between international regimes place related issues in different jurisdictions, they may well make side-payments and linkages between these issues less feasible.").

¹⁹ This notion is similar to what Robert Keohane calls "functional linkage," *see id.* at 95. Kenneth Oye's category of "explanation" linkage also largely overlaps with this category. As Oye points out, "While [other types of linkers] are seeking to construct a connection between issues, the explainer is pointing to an already existing connection between issues." KENNETH A. OYE, *ECONOMIC DISCRIMINATION AND POLITICAL EXCHANGE* 43 (1992).

that difference cannot be justified by the different substantive areas involved, there is an argument for reconciling this conflict through some linkage structure.

The claim for linking trade and the environment is sometimes formulated in coherence-conflict terms. The trade regime is largely based on the assumption that increased economic growth and production are the goals, whereas many environmentalists take the position that the primary norm is the conservation of the earth's resources. One response, of course, to such normative conflicts is the attempt to formulate a new overarching norm that reconciles the conflicting norms. In the trade and environment area, "sustainable development" appears to be such a norm.

To some extent, coherence-based linkage will occur in the absence of formal regime linkage. Assuming that two regimes are governed by similar general norms, and that the same parties participate in the two regimes, one can largely expect an implicit linkage and a coherent result.²⁰ For example, even if the General Agreement on Trade in Services were completely severed from the GATT, it probably would still have incorporated the basic GATT norms such as nondiscrimination, protection from "unfair trade," and reciprocity.²¹

The consequentialist claim does not depend on any relationship between the norms. Rather, it focuses on the policy goals of a regime. If the application of the rules of one regime would undermine the achievement of the goals of another, it may be desirable to reformulate the rules of the first regime so that the goals of the second can be achieved. In most cases consequentialist claims do reflect some conflict between the norms of the two regimes, but the argument for linkage is made in terms of the effects of the norms of one regime on the realization of the goals of the other. Claims for linking competition policy and workers' rights to the trade regime are often formulated in consequentialist terms. As to competition policy, the basic argument holds that the failure to adopt and enforce rules that assure a competitive market undermines the goals of trade liberalization. As to workers' rights, one argument maintains that increased competition from imported goods will lead countries to deny, or underenforce, those rights.

Strategic Linkage

Two somewhat different purposes are served by strategic linkage. One is the enhancement of relative bargaining power. Under some sets of circumstances, stronger nations will seek issue linkage so as to extend hegemonic power within one issue area to another. Under different circumstances, it might be the relatively weaker nations that seek linkage to prevent another nation from exercising such power.²² If, for example, the United States enjoys overwhelming bargaining power on economic issues in a trade agreement, it might seek to link other issues (e.g., human rights) to the trade negotiations in hopes of obtaining an agreement that it would not be able to obtain in isolation. Similarly, developing countries in a relatively weak bargaining position on the provision of foreign aid might seek to link that issue to one on which they have a stronger bargaining position.

The other purpose served by strategic linkage is to increase the means and variability of exchange.²³ For example, suppose two nations are negotiating on the subject of textile

²⁰ This is part of what Vinod Aggarwal has captured by his concept of "nesting" and the existence of overarching norms with which parties seek to comply in constructing more focused regimes. See AGGARWAL, *supra* note 16, at 27. However, if different parts of state bureaucratic structures are responsible for different regimes, and those bureaucracies have differing values, such coherence might not be achieved even though the same states are formally parties to the two regimes.

²¹ General Agreement on Trade in Services, WTO Agreement, Annex 1B. The problem with the GATS was strategic: many of the parties to the GATT would not have participated in the absence of linkage.

²² See KEOHANE & NYE, *supra* note 9, at 30–31, 122–23; see also Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226 (1985).

²³ See Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 *INT'L ORG.* 425, 448 (1979).

trade, but no set of outcomes exists to which they both will agree. In addition, the same holds true for the subject of intellectual property protection. Even though no normative relationship exists between the two subjects, a satisfactory outcome might emerge by linking the negotiations.²⁴

Most international negotiations in fact consist of a combination of issue agreement—that is, reaching an agreed resolution of specific issues—and issue linkage. A general norm governing modern international negotiation is reciprocity.²⁵ In most contexts, financial compensation is not used, so reciprocity must be obtained either through the resolution of a related cluster of issues, or through linking one set of such issues to another.²⁶ In other words, international negotiations are a form of barter in which the only means of payment are state commitments on issues of interest to the other party.²⁷ Usually, this exchange presents little difficulty, as interests are perceived to be equally and reciprocally oriented around a single legal standard, or set of standards, that address a cluster of issues. For example, many bilateral investment treaties (formerly treaties of friendship, commerce, and navigation) or bilateral most-favored-nation commitments could be negotiated in a fairly simple way because both nations might see their interests as equally served by the substantive standard.²⁸ In other circumstances, however, “issue barter” is necessary to achieve agreement.²⁹ The linkage of additional issues might be required either because there is no Pareto-superior agreement that could be reached on a single issue, or because any such agreement, although beneficial to both parties, is not regarded as sufficiently reciprocal by one of them. Issue linkage might therefore be sought for reasons of reciprocity even where the resolution reached on both issues is in each party’s interest.³⁰

It is thus not always an adequate response to a linkage claim to say that the issues have nothing to do with each other. That would be an adequate rebuttal only if the linkage claim were substantively based. Strategic linkage claims (including sanction-based linkage discussed below) do not posit any substantive relationship between the issues or issue areas to be linked. This feature does not mean that such linkage claims are in any sense illegitimate.³¹ Nevertheless, the strategic and sanction-based forms of linkage have been extremely

²⁴ See Bernard M. Hoekman, *Determining the Need for Issue Linkages in Multilateral Trade Negotiations*, 43 INT’L ORG. 693 (1989).

²⁵ See Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORG. 1 (1986); Alan L. Winters, *Reciprocity*, in THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS 45 (J. Michael Finger & Andrzej Olechowski eds., 1987).

²⁶ See Tollison & Willett, *supra* note 23, at 437, 444.

²⁷ As James Sebenius put it: “Think of issues as different types of commodities and of negotiators as traders in a market.” James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT’L ORG. 281, 283 (1983); see also Hoekman, *supra* note 24, at 695.

²⁸ In some ways, the bilateral investment treaty presents an easier case for negotiation, since at least at some times countries have regarded both incoming and outgoing investment as a benefit. Thus, agreement could be reached both between countries primarily interested in making foreign investments, and between a capital-exporting country and a capital-importing country. But despite the views of most economists, countries through most of modern history have taken a mercantilist approach to trade negotiations, so that only exports were regarded as a benefit and liberalization of imports was a price that had to be paid to obtain that benefit. The GATT strongly reflects both the reciprocity norm and its mercantilist application.

²⁹ See Hoekman, *supra* note 24, at 695.

³⁰ Kenneth Oye distinguishes between “extortion” and “exchange” in the linking of issues for purposes of negotiation. OYE, *supra* note 19, at 38–43. Extortion exists under Oye’s analysis when the party insisting upon linkage would be better off under a cooperative agreement on the first issue, no matter what the other party does on the other issue. According to this view, insisting upon reciprocity as analyzed here might qualify as “extortion.” When one takes into account the problem of dividing the surplus from a transaction, the distinction between exchange and extortion is less clear. Although Oye’s formal analysis of extortion appears to include the refusal to act cooperatively when it is in one’s interest to do so, his discussion focuses on Pareto-inferior moves or threats by a party seeking action on a linked issue. As a result, the distinction between exchange and extortion is contingent on both the status quo (i.e., the present distribution of resources, rights, and obligations) and the preferences of the parties. On the latter point, see *id.* at 44–45.

³¹ Indeed, the linkage claim might still be normative in the sense that global welfare will be enhanced if the two issue areas or regimes are linked together as a strategic matter.

controversial in international relations, and especially disputed in the multilateral context. To some extent, the objection is practical. While it might be feasible to pursue bilateral relations and bilateral agreements when "everything is on the table," multilateral arrangements pose formidable obstacles to doing so. The increasing demands for linkage have led to the expansion of multilateral regimes into "conglomerate structures" such as the United Nations Convention on the Law of the Sea and the World Trade Organization. But it would be widely regarded as unacceptable, and impracticable, if a nation were to demand concessions in the law of the sea agreement in exchange for liberalization of its trade. This example suggests, perhaps, that pure strategic linkage, without any substantive argument, is not generally accepted in multilateral contexts.

Claims based on distributional consequences present a more ambiguous situation. Distributional issues can be addressed within an issue area by resolving some issues in a way that offsets the distributional consequences of other issues. The distributional claim may be cast either as an overall criterion on which the negotiations will be judged, or as a normative argument for resolving a particular issue in a particular way in light of how other issues have been resolved. Where, however, the purpose is primarily to resolve a skewed distribution of benefits or costs, any issue with the desired distribution of benefits could be used, whether or not it is substantively related to the issues under discussion. International negotiations tend at times to frame linkage in normative terms, partly because of the resistance to purely redistributive payments. Thus, in the negotiations over the environment, developed countries agreed to establish a fund for developing countries to pay for certain measures of environmental protection, rather than simply agreeing to make an unrestricted side payment. Similarly, in the Uruguay Round trade negotiations, developed countries agreed to adjust their food assistance to compensate for the adverse effects on the food-importing developing countries of the restriction on agricultural export subsidies.³²

Sanction Linkage and Regime Borrowing

One type of strategic linkage worthy of special note demands that sanctions from one issue area be applied to enforce norms from another issue area. This is probably the best, and most common, argument for linking at least some human rights to trade policy and agreements. Some have regarded trade sanctions as the best means of enforcing commitments in a human rights regime. But basic trade norms (in particular, the most-favored-nation obligation and the commitment to tariff bindings) appear to prohibit the use of such sanctions. If we are to make those sanctions available, the two regimes must be linked in some way.

Claims for sanction linkage do not necessarily depend on any substantive relationship between the issue areas. Sanction linkage may be sought even though it affects neither the negotiating positions in the linked regime nor the distribution of benefits in either regime. Rather, the sanction claim for linkage is a specific example of a more general type of linkage benefit, namely regime borrowing. That is, linkage may be sought to obtain the institutional and procedural benefits of an existing regime, when similar arrangements cannot be independently negotiated for the issues sought to be linked. Sanctions are one type of such a possible benefit, but others include mechanisms of institutional participation, institutional authority (for example, to promulgate interpretations), and funding. When there is an effective competition between existing regimes, these factors may carry greater weight than substantive relationships.

³² Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, in *THE LEGAL TEXTS*, *supra* note 4, at 392.

This point is well illustrated by the problem of formulating an international investment regime. International investment is now primarily regulated through bilateral agreements, and to some extent through customary international law. One possibility would be to create a new international investment institution (e.g., a separate General Agreement on Foreign Investment). Alternatively, the investment regime could be incorporated into some existing multilateral institution, such as the IMF, the World Bank, or the WTO. Each of these institutions could make a substantive claim to being the proper home for a new regime for foreign investment. But equally or more important, they present different institutional structures and cultures. Their enforcement of norms and decision-making procedures (formal and informal) differ greatly. Although separate procedures could of course be formulated for the investment regime, doing so would create the potential for serious conflict within the regime and, in any case, the burden of justification would be on those who seek a different set of rules.

None of the above-described linkage claims can be dismissed *ab initio* as illegitimate. Rather, each must be addressed on its own terms (e.g., whether or not the claimed substantive relationship exists or the strategic linkage is desirable) and analyzed in terms of the costs and benefits of making the linkage sought. Those costs and benefits will depend significantly on just how the linkage is to be achieved, and it is to those possibilities that I now turn.

III. A TYPOLOGY OF LINKAGE MEANS

The preceding section analyzed the possible reasons for linking issue areas and regimes. Since some justification can be offered for almost any linkage (indeed, a strategic claim for linkage by a party virtually carries its own *ipse dixit* justification), the merits of linkage will ultimately turn on determining the costs and benefits of the particular means employed. The available means depend on the nature of what is being linked. If a particular issue is being linked to another issue, it makes little sense to link entire institutions and regimes into complex collaborative structures to achieve a much narrower goal. In the absence of agreed institutions and procedures, it is not clear how issue areas without such formal structures would be linked. Indeed, as suggested above, regime borrowing is a source of linkage claims where one of the issue areas, but not the other, is characterized by well-developed institutional structures.

Regimes thus present institutional opportunities for linkage that more diffusely governed issue areas do not. Not all linkage claims, however, require institutional linkages. Most of the scholarly literature has focused on strategic linkage claims. This type of linkage may possibly be achieved simply as a matter of negotiation and agreement; once agreement on both issues is obtained, no further linkage is required. This approach is common in international bilateral negotiations, but rare in the multilateral context. Rather, the examples of the law of the sea and the Uruguay Round trade negotiations demonstrate a tendency toward regime expansion and the development of what we might call “conglomerate” regimes. These are regimes that remain somewhat separate, in terms of both norms and institutional structures, within an overarching regime.³³ Like corporate conglomerates, they are marked by important institutional relationships and perhaps common policies among the constituent parts, but also by institutional separation. In this sense, the ongoing relationship between the distinct areas might still be characterized as linkage rather than scope, but in terms of the above analysis such conglomerates are hybrids.

³³ These conglomerate regimes can be regarded as the formalized version of Aggarwal’s nesting of regimes. See AGGARWAL, *supra* note 16.

Relational Aspects of Linkage

Before proceeding to an analysis of linkage structures, the introduction of some general terminology will be helpful. Linkages between regimes can be broadly divided into three relational categories: deferential, collaborative, and autonomous. The linkage is deferential if one regime defers to a determination of the other regime regarding the linked issue. The WTO, for example, is required to defer to any determination by the International Monetary Fund authorizing exchange restrictions, even though their effect may be equivalent to quantitative restrictions.³⁴ The linkage is collaborative if the resolution of any issue relevant to the linkage must be resolved by some joint mechanism. I draw a distinction here between “collaborative” and “cooperative.”³⁵ Collaborative connotes a joint product that requires the acquiescence as well as participation of both parties. A cooperative arrangement entails some obligation to work with the other organization and share views and information, but not necessarily deference or agreement in making a final decision.³⁶ Linkage is autonomous if the regime maintains its authority, without deference or collaboration, to make a decision. The World Bank, for example, is now required to take environmental issues into account in making loans, but it does so by including environmental issues within its normal decision-making procedures. Such an autonomous linkage might nonetheless require an obligation to cooperate.

Deferential and autonomous linkages are vectorial; that is, for two regimes that are linked together, the linkage might be autonomous for one, but deferential for the other. The linkage could also be autonomous for both regimes. Both regimes might be required to take the linked issue into account, perhaps even through cooperative actions, but neither would be required to defer to the other if the matter initially arose within that regime’s sphere of competence. Because regime structures (particularly voting and dispute settlement procedures) and institutional cultures differ substantially, the relational nature of any regime linkage is apt to be controversial. It will be especially contentious when regime norms potentially conflict and participants differ about the relative importance to be given the two regimes.

Autonomous linkages that depend on the interpretation of legal provisions and the potential balancing of conflicting values pose difficulties that collaborative regimes do not. Although some environmentalists might be satisfied with “greening the GATT,” others clearly do not trust a trade regime to administer any linkage between trade and the environment. They fear that trade officials will value the benefits of liberalized trade too highly, and discount the benefits of environmental protection. Thus, autonomous linkages may result in increasing pressure for additional linkage structures, such as opening WTO proceedings to environmental organizations.

Linkage Structures

Linkage without further specification is an extremely abstract concept. To say that two issue areas or regimes are linked implies somehow that decisions, values, or norms in one area or regime will influence the other. But it does not tell us how that influence will be brought to bear. In this section, I elaborate the various structures for achieving such influence.

³⁴ GATT Art. XV:2.

³⁵ Cf. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT’L ORG. 299 (1982) (distinguishing coordination from collaboration).

³⁶ This is certainly the meaning of the obligation to cooperate as used in the GATT. Interestingly, the word “collaborate” is used only in part IV, which was added in 1964 and intended to address issues of concern to the developing countries. The IMF Agreement uses both terms, and its usage is vaguely consistent with the distinction adopted here. Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, 60 Stat. 1401, 2 UNTS 39.

Negotiating linkage. Perhaps the simplest way to link issues is for the parties involved in negotiations to insist on a satisfactory resolution of both issues before agreeing to either one. Particularly in achieving linkage of specific issues in bilateral negotiations, there is no need for complex institutional or legal structures. Either party can insist that some range of issues be negotiated and settled before any agreements are reached. Issue areas can be linked in the same way, although this greatly complicates negotiating structures.

In the multilateral context, the means of linkage are more complex. If the only question is achieving, for each of the parties, a satisfactory set of agreements at a particular point in time, then the procedure suggested above can be adapted to the multilateral context: "Nothing is agreed until everything is agreed."³⁷ The Uruguay Round was an instance of multilateral issue area linkage (as was the negotiation of the Law of the Sea Convention). Although one agreement can be effectively conditioned on another, linking particular issues across agreements becomes relatively rare, as few persons within negotiating bureaucracies have the authority to make such trade-offs. In effect, the resolution of issue trade-offs is a matter of high-level decision in the final stages of negotiation.

Strategic linkage in negotiations without further institutional linkage makes linkage a one-shot affair. But in many circumstances one-shot linkage will not suffice to achieve the goals that underlie the linkage claim. It might, for example, prove difficult to reestablish linkage when changes are made in one regime, or if one of the regimes is weakly enforced. Some continuing linkage will be necessary, either to link enforcement of the two regimes or to coordinate the development, application, and interpretation of regime norms and goals. If the agreements are embodied in separate treaties, an explicit linkage might be required to make clear, as a legal matter, that one party's breach of one treaty might entitle the other party to suspend the other treaty in response.³⁸

Hierarchical linkage. One obvious means of linking diverse issues and institutions is through the establishment of a hierarchically superior institution that would resolve conflicts and coordinate activity in overlapping areas of authority. Although it has been proposed on occasion that the United Nations act as a sort of superadjudicatory, or at least coordinating, agency, that proposal has not been adopted.³⁹ The vision developed during World War II of a group of UN specialized agencies, each assigned its own issue area and astride of which would sit the United Nations, has gone unrealized. Indeed, it was a noteworthy omission that the new World Trade Organization, in contrast to the International Trade Organization that was agreed to in 1948, was not conceived of as a specialized agency of the United Nations. And even for those with the legal status of a specialized agency, the relationship to the United Nations now often seems no more than nominal.⁴⁰ In the meantime, new agreements and institutions have flourished, and older ones have expanded their membership and mandate. We inhabit a world of "multi-multilateralism"—numerous multilateral regimes with sometimes overlapping, indeed sometimes conflicting, mandates.

This regime structure poses fundamental difficulties for linkage. Indeed, one can argue that it is largely inconsistent with the notion of such linkage. Each of these regimes is generally regarded as voluntary; no state is required to participate in any particular international

³⁷ This was the basis on which the many agreements comprised by the Uruguay Round trade negotiations were negotiated.

³⁸ Although such retaliation is generally permissible in bilateral international relations, its status in the multilateral context is less clear, in part because many multilateral regimes are "self-contained," that is, have their own specified procedures for dispute settlement and enforcement.

³⁹ For a recent proposal, see Alvaro de Soto & Graciana del Castillo, *Obstacles to Peacebuilding*, FOREIGN POL'Y, Spring 1994, at 69.

⁴⁰ Executive heads of all United Nations agencies meet in the Administrative Committee on Coordination, but even in this context the Secretary-General does not exercise any hierarchical authority. "[H]e is at best *primus inter pares*." *Id.* at 75.

regime.⁴¹ Insisting upon linkage violates this principle, as it implies that participation in the linked regime is no longer voluntary. Moreover, some regimes explicitly or implicitly include norms that call the permissibility of linkage into question. The trade regime is the prime example because the unconditional most-favored-nation obligation operates to prohibit the linking of trade treatment to issues external to the trade regime.⁴²

Membership linkage. One way to link formal regimes (i.e., those governed by international institutions or multilateral agreements) is through a linked membership requirement. That is, a regime in which certain issues are considered relevant requires membership in a separate regime that explicitly governs those issues.⁴³ For example, to join the World Bank, a country must be a member of the IMF, although the reverse is not true. Similarly, to join the WTO, a country must either be a member of the IMF, or undertake comparable obligations regarding exchange rates.⁴⁴ This “macrolinkage” between institutions does not fully determine whether the linkage in particular contexts will be autonomous, deferential, or collaborative. The two linked regimes could continue to function completely autonomously, and the parties that insisted on linkage might view their concerns as sufficiently satisfied by the joint membership requirement. Conglomerate regimes such as the World Trade Organization in which most of the agreements are mandatory consist largely of membership linkage, although additional linkage structures are also present (including in the case of the WTO the hierarchically superior General Council and Ministerial Conference).

Membership linkage, without more, is a relatively weak form of linkage in that it does not make the enforcement mechanisms of the stronger regime available. Suppose, for example, that an amendment to the WTO Agreement required every member to adhere to the International Covenant on Civil and Political Rights. Such a requirement would not have an obvious effect on any GATT norms, including the most-favored-nation obligation.⁴⁵ That obligation would probably still be interpreted as prohibiting discrimination based on human rights abuses in the exporting country.⁴⁶ Of course, a membership requirement could be coupled with additional linkage mechanisms, including the incorporation of norms and the authorization of sanctions.

Incorporation (of an issue area). In membership linkage, the influence of one regime on another is implicit. The linkage essentially leaves unresolved how conflicts between regimes, whether in values or norms, should be dealt with. One way to link issue areas while avoiding conflict between regimes is by incorporating one issue area into a regime that governs the other issue area. This method, however, might not be a true form of linkage but, rather, an agreed expansion of scope. As previously suggested, competition between regime linkage and regime scope may always emerge, and incorporation may be said to constitute the scope solution to the linkage problem.

This view, however, oversimplifies the matter. Even when an issue is formally incorporated into a regime, the way it is incorporated will still pose important questions. The issue area

⁴¹ Each state, however, is required to adhere to principles of customary international law, some of which might develop as the result of a commonly adhered to international agreement.

⁴² See, e.g., *Belgian Family Allowances (Allocations Familiales)*, Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59 (1953); *United States—Restrictions on Imports of Tuna*, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 ILM 1594 (1991) (unadopted) [hereinafter *Tuna/Dolphin I*].

⁴³ Cf. Steve Charnovitz, *A Critical Guide to the WTO's Report on Trade and Environment*, 14 ARIZ. J. INT'L & COMP. L. 341, 355 (suggesting possibility of bringing multilateral environmental agreements into WTO framework as plurilateral trade agreements).

⁴⁴ GATT Art. XV:6. Because IMF membership has tended to be considerably broader than GATT membership, the vast majority of countries have fulfilled the requirement of this article through IMF membership.

⁴⁵ It might, however, result in a different interpretation of some of those norms, depending on the interpretive approach adopted.

⁴⁶ An exception for prison labor would be available under GATT Article XX(e), and a country could impose economic sanctions against countries violating human rights if these were specifically called for by action of the United Nations.

could be incorporated so as to preserve its distinctiveness, perhaps through the formulation of a conglomerate type of regime. Even if the conglomerate structure is not adopted, the issue may be compartmentalized in various ways that will limit its importance within and permeation through the overall institutional framework. For example, a separate committee might be established to address a specified issue raised by the incorporated issue area (e.g., environmental review of World Bank loans), and the normal institutional procedures would take such a committee's review into account in making a final decision. Alternatively, the issue area might be incorporated in some more pervasive way, so that it influences virtually all aspects of the regime's work. Thus, linkage and scope solutions are not sharply divided but present a range of alternatives.

The range of incorporation is well illustrated by the evolution of the treatment of development within the trade regime. The failed Charter for an International Trade Organization contained special provisions on development as well as the commercial provisions that eventually became the GATT. The GATT included some of the former provisions, but not all. Increasingly, the developing countries agitated for more attention to their needs. In 1964 they created a new regime, the United Nations Conference on Trade and Development (UNCTAD). The developed countries, which dominated policy making in the GATT, responded to this competition by adopting part IV of the GATT on trade and development. UNCTAD then formulated the principle of more favorable tariff treatment for developing countries, and the GATT acquiesced in 1971. At that point, the special treatment of developing countries (consisting of nonreciprocity in tariff negotiations, increased leniency regarding trade barriers to protect infant industry or the balance of payments, and permission for developed countries to favor goods from developing countries) was isolated in discrete provisions and contexts. From the Tokyo Round to the Uruguay Round, such treatment gradually became a pervasive principle of the GATT and the new World Trade Organization. Thus, one could argue that this principle evolved from weak linkage through partial incorporation to full incorporation into the trade regime.

The Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) represents a more limited form of incorporation. In that case, many of the norms of an existing regime, that is, the various agreements concluded under the auspices of the World Intellectual Property Organization (WIPO), were incorporated directly into the WTO TRIPS Agreement. Not all such norms were so incorporated, and the Agreement also encompassed norms covering new aspects of intellectual property rights. This approach, and indeed the history of the TRIPS agenda, suggests that the desire for linkage is based on "regime borrowing."⁴⁷ However, the TRIPS approach to incorporation, although to some extent carried out by reference to an existing regime that governed the issue area, was static and autonomous. Changes in the WIPO system do not automatically apply to WTO members, and WIPO interpretations of incorporated norms do not bind the WTO, although they would probably influence it. Thus, WTO sanctions are only available for violations of these statically incorporated norms, not for violations of any obligations under the WIPO agree-

⁴⁷ The norms of the TRIPS, including those incorporated by reference, are static. If the WIPO or other agreements are changed, the obligations under the TRIPS and the WTO Agreements do not incorporate those changes. The TRIPS calls for its council to establish "appropriate arrangements for cooperation" with WIPO, but in general does not adopt a deferential posture toward that organization. There are, however, two provisions that might be viewed as a form of deferential linkage. First, in an exception to the general rules for amending the WTO Agreements, if all members of the WTO have accepted higher levels of protection in multilateral intellectual property agreements, the WTO Ministerial Conference has the authority to adopt amendments incorporating those higher levels of protection into the TRIPS. WTO Agreement Art. X:6, referring to amendments proposed under Article 71 of the TRIPS. Second, and more important, procedures relating to the acquisition or maintenance of intellectual property rights that are provided for in multilateral agreements concluded under the auspices of WIPO are excepted from the most-favored-nation obligation of the TRIPS Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 5, WTO Agreement, Annex 1C. Thus, parties to the WTO Agreements still have some incentive to participate in WIPO.

ments. In some respects, then, this form of incorporation resulted in the formation of two distinct regimes to govern international aspects of intellectual property protection, with an ongoing weaker linkage between them.

Although issue area incorporation is always an alternative to the linking of formal regimes, it is particularly likely to occur when one area is not governed by a formalized regime, or an existing regime is regarded as fundamentally deficient. Regime amalgamation is possible, but in the international context the obstacles are especially formidable, except perhaps when some conglomerate structure already exists.

Issue linkages. To some extent, issue area incorporation and membership linkage represent poles on the spectrum of issue area linkage: from full amalgamation to complete institutional separation apart from the membership requirement. Both, however, take a wholesale approach to the linkage problem in that the entire issue areas are linked. Other approaches to linkage look instead to particular issues within issue areas. Some issues from one regime may be linked to the other regime. Environmental subsidies might be addressed, but not other aspects of environmental protection. Different mechanisms of linkage may be chosen for different issues, and factual questions may be distinguished from legal ones.

Once specific issues for linkage are identified, any of the three relational forms described above could be applied: autonomous, deferential, or collaborative. Autonomous approaches do not really constitute a form of regime linkage (although substantive issues will have been linked) unless they are coupled with some participatory structure (as described below). Collaborative and deferential approaches require the identification of issues to be resolved by another regime or by some special joint structure, such as an interorganization committee.

The GATT, for example, requires the Contracting Parties (now the WTO) to

accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and . . . accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES, in reaching their final decision in cases involving the criteria set forth in paragraph 2(a) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.⁴⁸

On other issues, however, only consultation is required, and the GATT has exclusive authority to make the ultimate determination.

The linkage with the United Nations is broader, and more deferential still. The GATT provides that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."⁴⁹

The two critical problems in such linkage are, first, to isolate and define the points or issues of linkage and, second, to decide who has the authority to decide whether such an issue is involved in a given circumstance. The above-quoted provision regarding deference to obligations under the UN Charter, for example, does not require the GATT to seek a determination or even advice from the United Nations or the International Court of Justice regarding a claim by a party that it is acting in pursuance of obligations under the Charter.

⁴⁸ GATT Art. XV:2.

⁴⁹ *Id.*, Art. XXI(c). This provision is effectively required by the UN Charter, which provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN CHARTER Art. 103.

In many circumstances, certain substantive issues are deferred to other institutions, but the preliminary jurisdictional determination is not.

Interpretive linkage. Each of the above linkage mechanisms assumes that the question of linkage has been addressed in at least one of the linked regimes. In many instances, the interaction between the issues and regimes has not been considered explicitly. In that case, the only available means of linkage may be through the interpretation of the legal provisions governing one or both of the regimes.

The generally authoritative source governing the interpretation of treaties is the Vienna Convention on the Law of Treaties.⁵⁰ Its provisions on multilateral agreements are both sparse and formalistic. Articles 40 and 41 govern amendments to multilateral treaties and Article 58 deals with the limited suspension of a multilateral treaty by agreement between the parties. Article 60, on suspension of a treaty as a sanction for material breach, includes special provisions for multilateral treaties. These provisions have some implications for certain forms of linkage, but do not address the use of interpretive principles to reconcile and link existing multilateral agreements. The provisions of the Convention governing interpretation of treaties and the application of successive treaties contain no distinctive provisions governing multilateral treaties. Under Article 30, when two multilateral treaties relate to the same subject matter, the later treaty prevails between states that are parties to both. As between states that are not parties to both treaties, only the provisions of the one to which they are both parties apply. Article 31, which sets forth the general rules of interpretation, includes as interpretive sources subsequent agreements and practice, but only as they specifically relate to the treaty in question.⁵¹

This formalism was well illustrated by the GATT panel's decision in the case brought by the European Community against the United States for its embargo on tuna that may not have been harvested by dolphin-safe methods.⁵² Both parties to the dispute had made arguments based on other bilateral and plurilateral treaties. The panel found these treaties irrelevant, since they had not been referred to in the preparatory work and did not constitute practice under the GATT.⁵³ In its report the panel mentioned only subparagraphs (a) and (b) of Article 31 (3) of the Vienna Convention, which do refer specifically to any subsequent agreement regarding interpretation of, or practice under, the treaty being interpreted. More helpful, perhaps, would have been subparagraph (c), which provides that "any relevant rules of international law applicable in the relations between the parties" shall also be taken into account. This provision should be interpreted as including obligations under treaties that apply between the parties, and thus softens the later-in-time rule specified by Article 30. Indeed, if the two treaties govern substantially different subject matters, Article 30 is arguably inapplicable, as it applies only to "successive treaties relating to the same subject-matter."⁵⁴ Thus, at least as between states that are both parties to two or more multilateral agreements governing different subject matter, the rules of one agreement could be taken into account in interpreting the provisions of the other.

These principles of interpretation could better reflect the multi-multilateralism described above.⁵⁵ Under this approach, for example, a WTO dispute settlement panel would take into

⁵⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331.

⁵¹ *Id.*, Art. 31 (3).

⁵² United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R (June 16, 1994), *reprinted in* 33 ILM 839 (1994) (unadopted) [hereinafter Tuna/Dolphin II].

⁵³ The panel's reasoning on the latter point was opaque. It was unclear whether it based its decision on the fact that only some parties to the GATT were parties to those arrangements, or more generally on the fact that those agreements were distinct from the GATT.

⁵⁴ Vienna Convention on the Law of Treaties, *supra* note 50, Arts 30, 31. However, an argument could be made that "the same subject-matter" refers to the specific instance of treaty application, and that any two treaties that might be interpreted as applying to the same problem or instance of state conduct relate "to the same subject-matter."

⁵⁵ See text following note 40 *supra*.

account all multilateral agreements implicated by the substance of a dispute. This technique, however, is open to two objections. First, some parties to the WTO will not be parties to other multilateral agreements, including agreements with a broad membership. This situation results in a dilemma. The WTO could enforce the other multilateral agreement against parties who have rejected it (or at least not accepted it), perhaps by declaring that the agreement has become part of customary international law. Or the WTO could apply the other agreement only to those WTO members that are parties to it. This result is objectionable because it violates the fundamental GATT norm, the most-favored-nation obligation. Indeed, it has the perverse effect in many situations of providing more favorable trade treatment to those nations that refuse to adhere, for example, to an environmental accord.

The second, and perhaps more difficult, objection is one of institutional bias. This type of interpretive linkage is autonomous. The WTO would be charged with reconciling the potentially conflicting aims of the GATT (or other WTO agreement) and the other agreement. The natural inclination of WTO personnel might be to favor the norms underlying the liberal trading regime (since that is their primary mandate) and to lean toward results that would prohibit trade barriers. Many environmentalists have therefore proposed institutional as well as substantive changes to reflect environmental issues in the WTO. These have included participation of environmental organizations in the dispute settlement process.

The most difficult problem in interpretive linkage is determining how broadly to pursue the goal of reconciling the conflicting principles of distinct multilateral regimes. For example, in the *Tuna/Dolphin* case (and in most similar cases involving environmental controls), the United States certainly could not point to any international agreement that required it to impose trade restrictions. Similarly, neither ILO conventions nor human rights covenants mandate the use of trade sanctions against countries that violate the standards in those agreements. Where the mandatory rules of two regimes do not conflict, a dispute settlement body arguably should not create conflict by recognizing forms of self-help not explicitly allowed by one agreement and forbidden by the other. Of course, where the rules of two regimes are ambiguous, the argument remains that the interpretive sources should not be limited to those pertaining to the regime exercising authority.

Participatory linkage. Institutional participation represents yet another model of linkage. It already forms part of the linkage mechanism of the institutions governing international economic law. The IMF, for example, generally participates as an observer at GATT Council meetings. The panel in one GATT dispute, at the request of one of the parties and the consent of the other, consulted with the World Health Organization (WHO). This case addressed a challenge by the United States to Thailand's restrictions on the import of foreign cigarettes.⁵⁶ The primary issue was whether such a restriction could be upheld under Article XX(b) of the GATT, which provides for a limited exception to GATT obligations for measures to protect human life or health.⁵⁷ The WHO met with the panel and made formal submissions to it. The information provided by the WHO described not only the health dangers of cigarette smoking, but also the marketing practices of multinational cigarette companies and the effects of their entrance into foreign markets. The United States did not dispute most of the WHO's information but did question the WHO's competence regarding "health consequences of the opening of the market for cigarettes."⁵⁸

This type of participation links issues by creating interactions between the multilateral institutions responsible for those issues. In terms of the relational models described above,

⁵⁶ Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1990), reprinted in 30 ILM 1122 (1991).

⁵⁷ *Id.*, para. 58.

⁵⁸ The exception is limited because the measures adopted must be "necessary," and must "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." GATT Art. XX [chapeau] & XX(b).

the linkage is autonomous-collaborative. Linkage of issue areas can also be achieved through the participation of nongovernmental organizations (NGOs) that effectively constitute special interest groups for particular issue areas. Some have proposed, for example, that international environmental NGOs be permitted to participate as interested third parties in WTO trade proceedings that raise environmental issues. The objection to such participation is often not to the linkage of issues but, rather, to the proposed role of nongovernmental and private parties, an issue well beyond the scope of this paper.

Permissive unilateral linkage. Linking multilateral regimes does not necessarily require multilateral means. The authority to create a linkage between issue areas or regimes might rest instead with the individual participants in those regimes. Such authority is itself a form of linkage, and might either be explicitly provided for by the agreements or result from interpretation of the applicable provisions. Although in theory such authority could be mandatory, it is more likely to be permissive. Other than the above-quoted provision regarding obligations under the United Nations Charter, the GATT contains no such explicit authority with regard to regimes outside the GATT.⁵⁹ One GATT panel has hinted that a multilateral regime might provide authority for unilateral action that would otherwise not be justified under the exceptions of Article XX of the GATT.⁶⁰ The GATT subsidies regime can be regarded in part as a form of permissive unilateral linkage between the issues of subsidies and trade regulation. Under the GATT, each country *may* impose countervailing duties to offset subsidies granted by the exporting nation. Some have proposed this approach for “social dumping”⁶¹ with regard to environmental protection and workers’ rights. An exception to the GATT permitting the imposition of duties in those circumstances would be a form of permissive unilateral linkage, although such duties, like countervailing duties, would probably be subject to WTO supervision.

The original exception in the Havana Charter for commodity agreements is a better example of the permissive unilateral linkage model. Article 45(a) (1) (ix) contained an exception for measures “taken in pursuance of intergovernmental commodity agreements concluded in accordance with the provisions of Chapter VI.”⁶² This linkage was encompassed by the “conglomerate” structure of the proposed International Trade Organization. In the narrower context of the GATT, it was adapted to require GATT approval either of criteria for the commodity agreement or of the agreement itself. However, in what appears to be an interpretive linkage, a note to Article XX provides that the exception “extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30(IV) of 28 March 1947.”⁶³ The Havana Charter also provided for deference (in the form of a permissive exception to its obligations) to intergovernmental agreements relating “solely to the conservation of fisheries resources, migratory birds or wild animals.”⁶⁴

The central distinction between unilateral linkage and multilateral issue linkage is marked by the extent to which participants may unilaterally decide the issues raised by the linkage. For example, such a linkage might require a threshold multilateral determination that a participant in the trade regime has violated internationally recognized human or labor rights.

⁵⁹ *Id.*, Art. XXI. See text at note 49 *supra*.

⁶⁰ Tuna/Dolphin I, *supra* note 42.

⁶¹ The reference to “dumping” is an attempt to draw an analogy to those provisions of the GATT regarding dumping and antidumping duties. That analogy, however, is somewhat inapposite, both because it is generally an action against the behavior of private firms and because the crucial element of dumping is selling below cost. The problem with “social dumping” is that firms are not required to internalize certain costs (e.g., measures for environmental protection and worker safety), and therefore benefit from an implicit subsidy.

⁶² U.S. DEP’T OF STATE, PUB. NO. 3206, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION: INCLUDING A GUIDE TO THE STUDY OF THE CHARTER, Art. 45.1 (1948) [hereinafter HAVANA CHARTER].

⁶³ GATT Ad Art. XX.

⁶⁴ HAVANA CHARTER, *supra* note 62, Art. 70.1.

Other participants in the regime would be permitted to impose trade measures only after the multilateral determination. Even if each country were relatively free to decide when another country had committed such violations, the multilateral basis of linkage could be partially maintained by providing for WTO supervision of the magnitude of any sanction imposed on human rights grounds.

The above examples are only a typology. A linkage between multilateral regimes will often encompass a variety of these mechanisms. The GATT-IMF linkage illustrates the complexity of linking regimes. The GATT adopts several linkage mechanisms between the issue areas of international monetary policy and trade policy, including institutional participation, issue deference, and issue cooperation. The complex GATT-IMF relationship also suggests that membership linkage will generally not be sufficient where the claim for linkage is substantive. Joint membership does not fully resolve problems of coherence or conflict, and thus necessitates additional linkage structures.

IV. THE DESIRABILITY OF LINKAGE

The preceding discussion suggests the various reasons for which linkage of issues or regimes may be sought, and the means by which international regimes or issue areas can be linked. It cannot be said that any of the claims identified is illegitimate, nor that any of the means is always inappropriate.⁶⁵ It is a matter, within a particular context, of determining whether the analytical and empirical bases of the claim can be substantiated, and—assuming that some agreement on linkage or inclusion can be obtained—of identifying the appropriate means for achieving the linkage.

In this last, brief section, I address what seem to me the most general potential objections to linkage claims. As regards substantive linkage claims, disagreement with their substance will usually be the principal reason for opposition. For example, one of the claims for linkage advanced by environmentalists and labor activists is that free trade encourages a “race to the bottom” in environmental and labor regulation. Free trade advocates, on the other hand, have disputed that basic claim, arguing that under free trade each nation will choose its own optimal policies. Linkage may be resisted simply on the ground that factual and theoretical assumptions on which the claim is based are wrong. Of course, even if the substantive claims for linkage are conceded to be valid, strategic considerations (as elaborated below) might still argue, on a national or global basis, against linkage.

Strategic claims for linkage cannot be disputed on the basis that there is an inadequate substantive relationship between the norms governing the two issue areas, as the claim is not based on any such relationship. Instead, opposition must be based on the costs and benefits, in terms of the expected result, of linking those areas.

Every linkage potentially raises strategic problems, whether or not the reason for the linkage is strategic. One reason for opposition is the self-interest of the participant.⁶⁶ Put simply, a participant might perceive that the linkage will lead to a less favorable arrangement,

⁶⁵ Some means, such as membership linkage and issue deference, are available only if two issue areas have been formalized into regimes.

⁶⁶ I do not mean to restrict “participant” here to the formal sense of a potential signatory to an agreement. Opposition out of self-interest might come from individual nations or from sectoral representatives.

Linkage also has the potential to introduce issues not present in either regime separately, which might create additional obstacles to agreement. For example, if the norms of one regime are not all included in the linkage, agreement must be reached on which norms are to be so linked. That is likely to be a difficult negotiation, as it potentially forces the parties to agree on the relative importance that is placed on the range of norms incorporated into that agreement. To take the case of human rights, the parties to the human rights covenants will probably disagree as to which norms are so fundamental, or so linked to some aspect of trade, that they should be selected for incorporation into the trade regime. These issues of differentiating the status or function of various rights would not need to be addressed in two independent regimes.

taking the expected results on both issue areas into account and comparing the linked result with the unlinked result.

Even if all parties would benefit from the linkage, the skewness of those benefits might cause parties to engage in strategic behavior so as to redistribute the rewards. Some parties might seek to exploit the linkage, perhaps by making claims that they would not make in the absence of linkage. Assume, for example, that agriculture and intellectual property are the only two issues on the trade negotiation agenda, and that one country has virtually no interest in the agricultural negotiations but a very strong interest in the intellectual property negotiations. It will potentially be to that country's advantage to resist making concessions in the agricultural negotiations, even though it has no objection to them, in order to enhance its negotiating position in the intellectual property discussions. In this way, linkage potentially encourages strategic behavior.

Beyond such self-interested strategic considerations, the argument might sometimes be made that linkage will reduce the global benefits to be obtained from multilateral negotiations. First, linkage might undermine the ability of nations to reach a consensus on the agenda and the resolution of the issues. In many instances, the degree of consensus regarding the norms in the linked regimes will differ considerably. Linking highly divisive issues on which there is no point of agreement between the parties can potentially inhibit agreement on the entire group of linked issues, including those on which agreement would have been possible in the absence of the linked issues.⁶⁷ In general, the greater the number of linked issues, and the more controversial those issues, the less likely it will be for an agreement to be reached. When, however, issues are controversial in the sense that most outcomes will have highly skewed distributional consequences, it may ease negotiations to link the issues to another controversial issue (assuming that distributional results are independent, and thus can be used together to reach an agreement that falls within the norm of negotiating reciprocity). Thus, one cannot argue as a general matter that strategic considerations militate for or against linkage; it will depend on the circumstances.

Second, linkage has the potential to undermine the normative framework for a particular regime or the degree of commitment to that regime. For example, inclusion of labor or environmental issues in the trade regime is likely more generally to lessen fidelity to the most-favored-nation clause, and could therefore more broadly subvert adherence to, and the definition of, the fundamental norms of that regime.⁶⁸ Equally important, linkage or the expansion of the regime's scope might weaken the degree of commitment to the regime, in particular the enforcement mechanisms to which the parties are willing to agree. Thus, given the weak enforcement mechanisms agreed to for the International Labour Organization, the inclusion of labor issues within the WTO framework might be expected to result in lessening the comparatively strong dispute settlement and enforcement procedures now available for trade disputes. In short, linkage is just as likely to result in "ratcheting down" to a weaker regime as ratcheting up. This slippage might not occur at the time of linkage but later as a matter of practice.

Linking disparate issues into a single regime also poses the risk that the policy goals of one of the issue areas will predominate, so that the goals of one are effectively sacrificed to the other.⁶⁹ This is a particular danger where diverse issue areas or distinct regimes are amal-

⁶⁷ For a more formal demonstration of this point, see Sebenius, *supra* note 27, at 300.

⁶⁸ See Ibrahim F. I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U.J. INT'L L. & POL'Y 27, 36 (1992) ("Political manipulation of the institutions by members in pursuit of their perceived national interests may be unavoidable once political considerations are allowed to be freely taken into account.")

⁶⁹ For a criticism of the United Nations peacekeeping and humanitarian roles along these lines, see James C. Ingram, *The Politics of Human Suffering*, NAT'L INTEREST, Fall 1993, at 59. Because the humanitarian function has failed to thrive alongside the peacekeeping function, Ingram suggests separating the two.

gamated into a single structure, and the institutional structure or bureaucratic players favor one set of policy goals over another. Again, this danger will vary according to the means chosen. Membership linkage tends not to pose this risk, although forcing states that are hostile to the linked regime to join in order to obtain the benefit of the other regime may create obstacles to the development of the linked regime. Sometimes the cost of turning plurilateral agreements into universal multilateral agreements is too great. For example, over time the parties to certain human rights agreements might be able to achieve more effective enforcement of those covenants and elaborate on the obligations concerned in greater detail. If, however, states basically hostile to the ideas underlying those covenants, or to their enforcement against nations, are forced to join so they can participate in the World Trade Organization, the result might be to prevent the human rights institutions from functioning effectively and developing further.

Third, and relatedly, linkage will sometimes create an additional source of regime instability. A linkage that suits the parties at one point in time may cease to suit them at another. Once regimes are linked, it may be that no regime can be stronger or more stable than the least stable of those regimes. Of course, linkage just as possibly may add stability not only to some regimes, but to all the linked regimes. The degree to which instability is transmitted may depend on the structure of the linkage. Relatively weak forms, such as membership and participatory linkage, will tend to isolate stronger regimes from the instability of the weaker ones. On the other hand, weaker forms of linkage will do little to stabilize inherently weak regimes.

These are some of the risks and costs associated with recognizing linkage claims. Linkage also presents some potential advantages in addition to the substantive merits of the linkage claim. International linkage may serve to forestall unilateral linkage that would seriously undermine the regime. For example, the United States might be persuaded to abandon some of its unilateral efforts to link trade to the environment if international economic organizations succeed in explicitly incorporating environmental considerations into their decisions and dispute settlement procedures. Cooperation with limited linkage will often be preferred to unilateralism (or bilateralism or regionalism) that incorporates a fuller measure of linkage. And as previously noted, linkage in some circumstances offers the potential to expand the means by which mutuality can be achieved, and thus enhances the ability to reach an agreement.

So where does this leave us? Space constraints do not permit a detailed analysis here, but I will venture a few tentative observations. The general presumption in the multilateral context appears to be that strategic linkage across regimes or issue areas that are not substantively related (in the sense set forth above) is unfair or counterproductive. This will not always be the case, but it leads most nations to resist it. Perhaps the fundamental problem boils down to the lack of consensus as to whether the linked issue ought to be the subject of an international agreement, or at least doubt as to whether a strong international regime is appropriate to the governance of that issue. That is, it seems inappropriate to use linkage to create pressure to reach an agreement on a subject on which few believe there should be a multilateral agreement at all. Where linkage is sought, it generally ought to be by weaker means that do not undermine the ability to reach agreements.

Substantive linkage, on the other hand, provokes an array of responses for both substantive and strategic reasons. Where it is strongly supported (as for linking labor and environmental issues with trade), such linkage can probably not be resisted altogether. Rather, the goal must be to choose the means of linkage that most effectively advance the policies sought to be linked (e.g., environmental and labor), without undermining the ability to reach agreement and make progress in the other regime. Interpretive linkage holds promise in this respect, and the WTO now seems in effect to have endorsed this approach. With

regard to the role of environmental agreements and norms in the interpretation of GATT obligations, for example, the WTO dispute panels have basically done an about-face. They have moved from a wooden, formalistic approach that largely ignored the evolution of international environmental law, to one that tries in a nuanced way to incorporate this evolution into a dynamic interpretation of the GATT rules.⁷⁰

Carefully tailoring the modality of linkage to the substantive (or on occasion strategic) claims advanced for linkage will enable us to see that these are not all-or-nothing claims but, rather, steps in the evolution of a complex multilateral regulatory framework across a variety of issue areas. Linkage so pursued should not obstruct agreement; on the contrary, it should further enhance the coherence of that multilateral world and the legitimacy of its institutions.

In general, however, linkage ought not to substitute for attempts to formulate and improve the distinct international regimes that govern the linked areas. Regime borrowing and sanction linkage in particular tend to reflect frustration and disappointment with the borrowing regime (or nonregime) governing the issue area to be linked. In most such situations, linkage is a second-best solution. It would be preferable to develop the unsatisfactory regime independently.

⁷⁰ Compare, e.g., United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), reprinted in 38 ILM 118 (1999), with Tuna/Dolphin II, *supra* note 52.